IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANDREW BARRETT, on behalf of himself and others similarly situated,	)	
	)	Civil Action No. 2:15-cv-01348
Plaintiff,	)	
	)	Judge George C. Smith
v.	)	
	)	Magistrate Judge Norah McCann King
THE ADT CORPORATION,	)	
	)	
Defendant.	)	

Plaintiff's Response in Opposition to
ADT's Motion for Summary Judgment

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Plaintiff Andrew Barrett alleges that Defendant ADT has repeatedly violated the Telephone Consumer Protection Act's ban on prerecorded telemarketing calls to mobile phones. ADT can hardly deny the substance of Mr. Barrett's claim; in fact, it candidly admits that Mr. Barrett and others received telemarketing calls on ADT's behalf that used a prerecorded voice to deliver a message. (*See* ADT's Mot. to Dismiss, 3–4, ECF No. 14.) So, in an effort to avoid responsibility, ADT has moved for summary judgment on two grounds: (1) attempting to outsource its TCPA liability to a nameless Philippines call center, and (2) claiming that the TCPA abridges ADT's constitutional right to make unwanted prerecorded calls to mobile telephones.

As explained below, however, the record contains ample evidence upon which a reasonable juror could find ADT vicariously liable for the calls made on its behalf, and ADT's First Amendment arguments do not threaten the long-recognized constitutionality of the TCPA.

I. Facts

ADT, a home security provider, sells its goods and services through a network of more than 300 "Authorized Dealers." (Ex. A, 26.)[1] ADT's Authorized Dealers have access to ADT's customer databases and other proprietary information, and are authorized to used ADT's name and logo. (Dealer Agreement Ex. B, §§ 2–4; Pitman Dep. Ex. C, 71–76.) Many of those dealers, including a company called Security Solutions, Inc. ("SSI"), rely heavily on telemarketing. (Exhibit C, 28.)

[1] In its motion for summary judgment, ADT selectively incorporates certain documents and testimony obtained in previous litigation between the parties. So that these materials can be understood in context, Mr. Barrett has attached, as Exhibit A, Plaintiff's Statement of Material Facts and combined exhibits from that case. *See Fitzhenry v. The ADT Corp.,* No. 14-80180, ECF No. 122 (S.D. Fla. Oct. 3, 2014). For clarity, this combined exhibit is renumbered in the bottom-right corner as "Exhibit A 001-371." When Exhibit A is cited in this brief, the citations are to the number in the bottom-right corner.

On September 12, 2013, Mr. Barrett received such a telemarketing call on his mobile phone. (Decl. of Mr. Barrett Ex. D, ¶ 12) Upon answering the call, there was an awkward pause from the calling party, and Mr. Barrett attempted to identify himself, but was cut off by a voice that identified itself as "Katie" with "Home Protection." (*Id.* ¶ 5.) Plaintiff had never provided any entity with consent to call him on his mobile phone with telemarketing messages for ADT, SSI, or any other security company or product. (*Id.* ¶ 6.) Mr. Barrett told the caller he was not interested and the call terminated. (*Id.* ¶ 7.)

As Mr. Barrett later learned, "Katie" was not a live telemarketer, but an audio recording made by a company called Perfect Pitch. (Kasick Dep. Ex. E, 27–31.) Although the TCPA bans telemarketing calls that use a prerecorded voice to deliver a message, Perfect Pitch technology allows a sales agent to play prerecorded messages intended to respond to call recipients' statements and questions, all while carrying on several of these "conversations" at once. (*Id.;* Ex. C, 306.)[2] In 2013, ADT's authorized dealer SSI used Perfect Pitch technology to promote ADT goods and services on a massive scale. From June to December of that year, it commissioned call centers in the Philippines that made millions of such calls to American consumers. (Munns Dep. Ex. F, 45–46, 65–66)

Although ADT now claims it was unaware of SSI's efforts, the evidence shows otherwise. Indeed, ADT knew that its authorized dealers—including SSI—were engaged in illegal prerecorded telemarketing, but did nothing to stop it. For example:

- In 2011, ADT faced a nationwide class action alleging illegal prerecorded telemarketing by its dealers, a case that ultimately settled for more than $15 million. *See Desai v. ADT Sec. Servs., Inc.,* No 11-1925, (N.D. Ill. June 21, 2013), ECF No. 247.

[2] Unsurprisingly, the technology often results in awkward calls that border on the absurd. (Compl ¶ 68-71.)

- In February 2012 — more than a year-and-a-half before the call to Mr. Barrett — ADT was sued in South Carolina over illegal prerecorded telemarketing *by SSI* using the same exact technology that called Mr. Barrett. (Ex. A, 251.)

- Six months after that, in August 2012, Plaintiff's counsel (who was litigating the *Desai* case) sent ADT an email advising that a consumer named Jay Connor had received a prerecorded telemarketing call from SSI. Attached to the email was *a recording of the illegal call that used the same technology.* (*Id.*, 274, 279, 282–86.)

- Finally, three more times in 2012—in August, October, and November—ADT and SSI were named as codefendants in suits alleging violations of the TCPA. (*Id.*, 291, 306, 316.)

ADT's dealer agreements give it broad control over its dealers—from training, to the right to review scripts, to the ability to fine, discipline, or terminate dealers for violating ADT's guidelines. (Agreement Ex. B, §§ 2–4; Runa Dep. Ex. G, 35–36; Guidelines Ex. I, 4.) Nonetheless, despite all of the above, ADT did not investigate these allegations; did not contact SSI about the allegations; did not inform its TCPA compliance department; ordered no audit of SSI's telemarketing practices; requested no records or other information from SSI; and took no disciplinary action of any kind against SSI. (Runa Dep. Ex. G, 57–59, 75–76, 102–103, 137; Pitman Dep. Ex. C, 182–83, 197–98.) Instead, ADT paid SSI more than $2.5 million for obtaining new customers in 2012 and invited SSI's owner to a celebrity pro-am golf tournament in 2013. (Pitman Dep. Ex. C, 55–56.)

Even after all of this, on March 25, 2013, ADT granted SSI a new "Certificate of Telemarketing Compliance." (Ex. H.)

II. Argument

A. ADT is not entitled to summary judgment on vicarious liability.

ADT's hear-no-evil, see-no-evil approach to telemarketing is no shield to liability in this case. Though it now distances itself from SSI, ADT long allowed SSI to use the ADT name and trademarks while engaging in illegal telemarketing. In addition, in 2012, prior to the calls at issue in this case, ADT faced multiple lawsuits based on SSI's illegal prerecorded telemarketing and was warned about the specific technology SSI used, but failed to exercise its contractual rights to punish SSI. Instead, ADT rewarded SSI handsomely for the business it generated through nefarious means. These facts, among others, are more than sufficient for a jury to find ADT vicariously liable for the calls at issue in this suit.

1. Vicarious liability under the TCPA.

Under the TCPA, "sellers" like ADT can be vicariously liable for the unlawful calls of third-party telemarketers based on "federal common law principles of agency," including theories of apparent authority and ratification. *See In re Joint Pet. filed by Dish Network, LLC*, 28 FCC Rcd. 6574, 6582–84 (May 9, 2013) (the "FCC Ruling"). A primary purpose of vicarious liability under the TCPA is to address the problem of sellers "outsourcing" TCPA liability to third parties who are often "judgment proof, unidentifiable, or located outside the United States." *See id.* at ¶ 37. Thus, the threat of vicarious liability gives sellers "appropriate incentives to ensure that their telemarketers comply with [the FCC's] rules." *Id.* Otherwise, sellers "would benefit from undeterred unlawful acts, and the statute's purpose . . . would go unrealized." *Id.*

Importantly, "the existence of an agency relationship and the scope of the relationship are questions of fact" for a jury. *Mike Vaughn Custom Sports, Inc. v. Piku*, 15 F. Supp. 3d 735, 752–53 (E.D. Mich. 2014). As a result, the Sixth Circuit has emphasized that a court should not grant summary judgment on an agency issue if there is "*any* conflicting evidence" concerning the relationship. *See Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 661 (6th Cir. 2005) (emphasis added). In this case, where substantial evidence suggests that ADT knew or should have known about SSI's unlawful telemarketing, but took no action to stop it, ADT's motion for summary judgment cannot prevail.

2. By turning a blind eye and eagerly accepting the benefits of SSI's unlawful telemarketing, ADT ratified SSI's conduct.

Abundant evidence supports ADT's liability under ratification principles. "[A] seller may be liable for the acts of another under traditional agency principles if it ratifies those acts by knowingly accepting their benefits." FCC Ruling ¶ 34, & n.104 (citing Restatement (Third) of Agency § 4.01 cmt. d).[3] Applying this principle in the telemarketing context, the FCC has explained that "ratification may occur through conduct justifiable only on the assumption that the person consents to be bound by the act's legal consequences." *Id.* For this reason, "a seller would be responsible under the TCPA for the unauthorized conduct of a third-party telemarketer…if the seller knew (or reasonably should have known) that the telemarketer was violating the TCPA on the seller's behalf and the seller failed to take effective steps within its power to force the telemarketer to cease that conduct." FCC Ruling ¶ 46. Envisioning the type of scenario present here, the FCC has explained that, "a seller may be bound by the unauthorized conduct of a telemarketer if the seller "*is aware of ongoing conduct* encompassing numerous acts by [the telemarketer]" and the seller "*fail[s] to terminate*," or, in some circumstances, "*promot[es] or celebrat[es] the telemarketer*." *Id.* (emphasis added).

[3] The FCC was correct to look to the Restatement as the source for federal agency law. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 n.31 (1989) ("In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency."); *Doe I v. Unocal Corp.*, 395 F.3d 932, 972 (9th Cir. 2002) ("The general principles of the federal common law of agency have been formulated largely based on the Restatement of Agency."); *Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 865 n.15 (7th Cir. 1998) ("In developing the federal law of agency, courts have relied on the Restatement of Agency as a valuable source for those general agency principles."); *Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256, 260 (4th Cir. 1997) ("To determine the general common law of agency, the [Supreme] Court notes that it has traditionally looked to sources such as the Restatement of Agency.").

While ADT's motion trumpets its alleged ignorance of SSI's conduct, the record shows that ADT had ample notice of SSI's illegal prerecords, including that:

- In 2012, ADT was sued four times in a nine-month span for SSI's use of prerecorded message telemarketing;
- In March 2012 – 18 months before the September 12, 2013 prerecorded message to Mr. Barrett – ADT learned that SSI was using an unapproved third-party marketing company to place telemarketing calls; and
- On August 24, 2012, ADT and its general counsel were told that SSI was using illegal prerecorded telemarketing messages, and even received an audio recording proving the point.

ADT never investigated these allegations. Instead, in 2012 alone, ADT paid SSI more than $2.5 million for the new customers SSI generated through its telemarketing efforts. In 2013, ADT even feted SSI's owner by inviting him to play in a celebrity pro-am golf tournament. At no time did ADT train SSI regarding telemarketing compliance, despite the fact it held regular webinars and in-person sales trainings for dealers. And at no time did ADT exercise its contractual right to discipline SSI or levy a single penny in fines for illegal prerecorded telemarketing. As a result, ADT's failure to terminate (or even investigate) SSI, along with its decision to "promote" and "celebrate" SSI's efforts, easily satisfies the test for ratification set forth in the FCC Ruling.

ADT's arguments to the contrary are unavailing. First, despite ADT's assertion, ratification does not require a pre-existing agency relationship. Rather, "ratification is the affirmance of a prior act done by another, whereby the act is given effect *as if done by an agent* acting with actual authority." *Id.* § 4.01(1) (emphasis added); *see also Brainard*, 432 F.3d at 661 ("An agency relationship may arise pursuant to several theories. . . . The principal's ratification of the unauthorized acts of another may also establish an agency relationship"); Restatement

(Third) of Agency, § 4.01 cmt. b ("[R]atification may create a relationship of agency when none existed between the actor and the ratifier at the time of the act.").

Second, ADT cannot hide behind the assertion that it "had no advance knowledge of [SSI's agents] K2 and Perfect Pitch." Indisputably, ADT knew that SSI was engaged in illegal prerecorded telemarketing for the purpose of selling ADT products and services. If ADT knew little about the specifics of SSI's activities, that is because ADT chose not to know. But a seller cannot avoid ratification liability by claiming ignorance. As the Restatement explains, "[A] principal may choose to ratify the action of an agent *or other actor* without knowing material facts. *A factfinder may conclude that a principal has made such a choice when the principal is shown to have had knowledge of facts that would have led a reasonable person to investigate further, but the principal ratified without further investigation*." Restatement (Third) of Agency § 4.06 cmt. d (emphasis added). Thus, ADT's willful ignorance in the face of ample notice of the need to investigate repeated allegations of illegal prerecorded calls, coupled with acceptance of the benefits of that illegal conduct, is more than enough to create a material issue of fact on vicarious liability.

3. By allowing ADT to use its name and integrating SSI into its operations, ADT cloaked SSI with apparent authority to make the illegal calls at issue.

A seller may also be liable under the doctrine of apparent authority, which extends well beyond the consent and control requirements of formal agency. Apparent authority "holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal." FCC Ruling ¶ 34 (quoting Restatement (Third) of Agency § 2.03 cmt. c). Like ratification, apparent authority does not require a pre-existing principal-agent relationship. *See* Restatement (Third) of Agency § 2.03 ("Apparent authority is the power held by an agent *or other actor* . . .") (emphasis added). In this case, a reasonable factfinder drawing all permissible inferences in Plaintiff's favor could find ADT liable under apparent authority principles for several reasons.

First, ADT may be liable because it allowed SSI to hold itself out as an "Authorized Dealer," expressly permitted to telemarket ADT services, assemble ADT customer information, and use the ADT name and logo. In recent TCPA class actions involving a different alarm system dealer, another district court has twice held that "that fact alone could lead a reasonable finder of fact to conclude that [the seller] cloaked the [third-party telemarketer] with the apparent authority to act on [its] behalf." *See Mey v. Monitronics Intern.*, *Inc*., 959 F.Supp.2d 927, 932 (N.D. W. Va. 2013) (denying defendants' motion for summary judgment); *In re Monitronics Intern., Inc., TCPA Litig.*, No. 13-2493, 2015 WL 1964951, at *8 (N. D. W. Va. April 30, 2015). Other courts have reached the same conclusion. *See, e.g., Lushe v. Verengo Inc.*, No. 13-7632, 2014 WL 5794627, at *7 (C.D. Cal. Oct. 22, 2014) (authorizing telemarketer to use Defendant's name creates apparent authority).

Second, the FCC has explained that apparent authority may be established by evidence "that the seller allows the outside sales entity access to information and systems that normally would be within the seller's exclusive control, including: access to detailed information regarding the nature and pricing of the seller's products and services or to the seller's customer information." FCC Ruling ¶ 46. Here, ADT provided SSI with password-protected access to ADT's dealer-only website, which allowed dealers to enter customer information, manage their business, communicate with ADT, share customer leads, submit financial reports, run credit checks on potential customers, obtain marketing materials, and access confidential and proprietary product information.

Finally, the fact that ADT had the right to — and in fact did — review SSI's telemarketing scripts further supports a finding of apparent authority. FCC Ruling ¶ 46 ("It may also be persuasive that the seller approved, wrote or reviewed the outside entity's telemarketing scripts."). And although ADT may claim that it did not review Perfect Pitch's scripts, it could have done so, and perhaps it would have done so had if it exercised its right to audit SSI's telemarketing practices after being sued four times for SSI's alleged illegal telemarketing.

On these bases, a jury could conclude that a third party like Mr. Barrett reasonably believed that the illegal call he received was made with ADT's apparent authority.

4. ADT's conduct, not its disclaimers, controls the establishment of an agency relationship.

ADT's defense against vicarious liability relies heavily on provisions in its Authorized Dealer Agreement that purport to disclaim any agency relationship and prohibit SSI from engaging in unlawful activities. Those self-serving provisions, however, cannot supplant the role of a jury in determining the existence of agency.

This point is well-settled: "Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling." Restatement (Third) Of Agency § 1.02 (2006). Moreover, as the FCC noted in its Declaratory Ruling, "the presence of contractual terms purporting to forbid a third-party marketing entity from engaging in unlawful telemarketing activities would not, by themselves, absolve the seller of vicarious liability." FCC Ruling ¶ 34 n.102 (citing Restatement (Third) of Agency § 2.03). Apparent authority and ratification theories are established through *conduct,* and cannot be disclaimed by willful ignorance or the presence of contract terms. Accordingly, "[a] principal may not choose to act through agents whom it has clothed with the trappings of authority and then determine at a later time whether the consequences of their acts offer an advantage." Restatement (Third) of Agency § 2.03 cmt. c.

5. ADT's reliance on *Keating* is misplaced.

Notably, ADT's motion for summary judgment does not even mention the FCC's seminal 2013 order on vicarious liability. Instead, ADT relies almost exclusively on a single, unpublished opinion, *Keating v. Peterson's Nelnet, LLC,* 615 F. App'x 365 (6th Cir. July 21, 2015). Not only does *Keating* lack binding or persuasive force, but ADT overstates *Keating's* holding and glosses over key factual distinctions.

Much of ADT's citation to *Keating* focuses on whether the various defendants in that case were part of a classic principal-agent relationship. In fact, the court's analysis of the parties' contractual relationship and the "attenuated" "chain" between seller and caller was expressly limited to the viability of a traditional "expressed-agency theory." *See id.*, at *373. That discussion, however, is irrelevant to Plaintiff's apparent authority and ratification theories, which are not constrained by such formal strictures.

Tellingly (in a passage ADT failed to include in its brief), *Keating*'s analysis of ratification and apparent authority actually highlights the critical and dispositive factual distinction between that case and this. In *Keating*, the court emphasized that the FCC's broad vicarious liability principles did not apply because (1) there was "no evidence that the defendants had any information that would have suggested that unauthorized text messages were being sent," (2) "the defendants could not have envisioned the breach in protocol that occurred," and (3) that, critically, "when those misdeeds were brought to light, [the defendant] took immediate and appropriate action to suspend the campaign until it received assurances . . . that such missteps would not be repeated." *Id* at 375.

Those facts could not be more different from the evidence in this case, which shows that ADT had knowledge that illegal calls were being made on its behalf but chose not to punish or investigate — but rather to reward — its telemarketer SSI. That difference precludes summary judgment based on *Keating*, the only case on which ADT rests its argument.

B. The TCPA does not violate the First Amendment.

ADT's second ground for summary judgment fares no better. Despite anticipating the Court's "natural skepticism," ADT asks the Court to overlook two decades of precedent and stand alone in declaring the TCPA unconstitutional. ADT's argument is based on a misunderstanding of the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which applied longstanding First Amendment principles to a local sign ordinance that bears no resemblance to the TCPA. Because *Reed* does not apply (and in any event, the TCPA would survive strict scrutiny), the Court should deny ADT's motion.[4]

1. As a content neutral regulation, the TCPA is subject to intermediate scrutiny only.

Courts apply different levels of scrutiny to different types of speech. "Content-neutral" restrictions on the time, place, and manner of speech are subject to "intermediate scrutiny." *See, e.g.*, *Bench Billboard Co. v. City of Covington, Ky.*, 465 F. App'x 395, 404 (6th Cir. 2012) (quoting *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984)). "Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "Content-based" restrictions, on the other hand, are subject to "strict scrutiny."

[4] Earlier this month, the Department of Justice mounted a similar defense of the TCPA's constitutionality in *Duguid v. Facebook, Inc.*, No. 15-00985 (N.D. Cal Dec. 11, 2015), ECF No. 44. A copy of that brief is submitted as Exhibit J.

Planet Aid v. City of St. Johns, MI, 782 F.3d 318, 326 (6th Cir. 2015) (citing *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 811 (2000)).

Since it was enacted more than two decades ago, courts have consistently held that the TCPA is a content-neutral regulation of speech. *See Gomez v. Campbell-Ewald Co.,* 768 F.3d 871, 876 (9th Cir. 2014) (holding that TCPA is content-neutral and "necessary" to ensure consumer privacy); *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) (concluding § 227(b) is content-neutral because it "regulates all automated telemarketing calls without regard to whether they are commercial or non-commercial"); *Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378, 1380 (N.D. Ga. 2013) (reasoning that because "[t]he TCPA regulates 'any call,' regardless of its message[,] . . . [it] is a content-neutral time, place, and manner restriction on speech"); *Strickler v. Bijora, Inc.,* No. 11-03468, 2012 WL 5386089, at *5–6 (N.D. Ill. Oct. 30, 2012); *Abbas v. Selling Cource, LLC*, No. 09-3413, 2009 WL 4884471, at *7–8 (N.D. Ill. Dec. 14, 2009). In the eyes of the TCPA, all non-exempt calls and texts are treated uniformly, regardless of whether they convey a message that is an ideological, political, or commercial in nature. Thus, the TCPA's regulation of automated telemarketing is not a limitation on the *subject* of speech, but rather a permissible restraint on the *manner* of speech (*i.e.,* the technology used).

The Supreme Court's opinion in *Reed*, which broke no new constitutional ground, *see* 135 S. Ct. at 2226-28, does not alter that conclusion. *See Chiropractors United for Research & Educ., LLC v. Conway*, No. 15-00556, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015) (observing that *Reed* "is not groundbreaking doctrine").[5] In *Reed*, the Supreme Court applied

[5] The only post-*Reed* telemarketing case on which ADT relies, *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), is inapposite. In *Cahaly*, the Fourth Circuit applied *Reed to* strike down a state telemarketing law; the law in that case, however, was deemed content-based only because it "applie[d] to calls with a consumer or political message but [did] not reach calls made for any other purpose." *Id.* at 405.

longstanding First Amendment principles to conclude that a municipal ordinance restricting the display of outdoor signs was content-based and subject to strict scrutiny. While the ordinance at issue in *Reed* purported to impose general limitations on the display of outdoor signs, it was obviously flawed, creating more than 23 separate categories, each subject to different rules about size, location, and duration. *See Reed,* 135 S. Ct. at 224. Justice Kagan wrote that the troubled ordinance failed even "the laugh test." *Id.* at 2239 (Kagan, J., concurring).

The TCPA is vastly different. As relevant here,[6] the TCPA prevents one narrow category of calls to wireless numbers: those made using an artificial or prerecorded voice. *See* 47 U.S.C. § 227(b)(1)(A)(iii). Unlike the ordinance in *Reed*, the TCPA creates just two exceptions — calls made with consent, and calls initiated for an emergency purpose — which are not constitutionally problematic. The exempted calls do not impact consumer privacy, and it is well-established that when a significant government interest permits a blanket prohibition (such as a ban on prerecorded calls), it is not content-based discrimination to exempt from that prohibition a narrow band of speech unrelated to the significant government interest at stake (such as prerecorded emergency notifications). *See R.A.V. v. City of St. Paul, Minn*, 505 U.S. 377, 388 (1992).[7]

Finally, in contrast to *Reed*, which involved speech in the most traditional public fora — the public streets — a court considering the constitutionality of the TCPA must consider an important countervailing factor against First Amendment concerns: the privacy of "unwilling listeners." *See, e.g., Hill v. Colorado*, 530 U.S. 703, 714–16 (2000); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 320 (1974). The privacy concerns here are significant. The TCPA restricts only calls made and messages sent without consent, *see* 47 U.S.C. § 227(b)(1)(A), and it was enacted to address the same weighty interests that the Court has repeatedly seen fit to balance against a speaker's First Amendment rights, *see Erznoznik*, 422 U.S. at 208 (collecting cases). Accordingly, concern for the rights of Mr. Barrett and others like him makes intermediate scrutiny just as appropriate here as it was in *Hill*, which *Reed* did not overrule. *See Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409, 421–24 (1986) (stating that the assumption that prior precedent has been overruled by implication is disfavored).

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[6] Many of ADT's arguments are based on TCPA subsections that have nothing to do with Mr. Barrett's claims. *See, e.g.,* Def.'s Br., 14–15 (referencing provisions relating to commercial "junk faxes" under § 227(b)(3) or "telephone solicitations" applicable to FCC do-not-call rulemaking under § 227(c)).

[7] In *Duguid*, the Department of Justice provided a helpful illustration of this principle: It is well-established that a municipality can prohibit individuals from making excessive noise after a certain hour, but such a law would not be rendered unconstitutional if it provided an exception for emergency sirens.

As a result, *Reed* does not compel this Court to upend more than two decades of TCPA jurisprudence holding that the TCPA is content-neutral and subject only to intermediate scrutiny.[8]

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[8] Even assuming *Reed* called into question prior authority concluding that the TCPA is content-neutral, it would not serve ADT's purpose in this case. Unlike this case, *Reed* did not implicate commercial speech, which is subject only to intermediate scrutiny as defined by the *Central Hudson* test." *Contest Promotions, LLC v. City & Cty. of S.F.*, No. 15-00093, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980)); *see also, e.g., Dana's R.R. Supply v. Attorney Gen., Fla*, No. 14-14426, 2015 WL 6725138, at *6 (11th Cir. Nov. 4, 2015); *Chiropractors United for Research & Educ., LLC v. Conway*, No. 15-00556, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015). Since Mr. Barrett's claims are based solely on telemarketing calls in violation of the TCPA, ADT lacks standing to challenge the constitutionality of the TCPA as it applies to non-commercial calls. *See Pimental v. Google Inc.*, No. 11-02585, 2012 WL 691784, at *3 (N.D. Cal. Mar. 2, 2012).

2. The TCPA passes intermediate scrutiny, and would even survive strict scrutiny.

Laws subject to "intermediate scrutiny" will be upheld "provided [1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored [3] to serve a significant governmental interest, and [4] that they leave open ample alternative channels for communication of the information." *Bench Billboard Co. v. City of Covington, Ky.*, 465 F. App'x 395, 404 (6th Cir. 2012) (quoting *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984)).

Courts across the country have concluded that the TCPA satisfies these conditions. "[T]he TCPA serves a significant government interest of minimizing the invasion of privacy caused by unsolicited telephone communications to consumers." *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1011 (N.D. Ill. 2010); *see also Wreyford*, 957 F. Supp. 2d at 1380 (noting government's significant interest in "preventing unsolicited calls from imposing uninvited costs upon telephone subscribers"). As one court observed in upholding the constitutionality of a similar state statute:

> [T]he residential telephone is uniquely intrusive…. [T]he shrill and imperious ring of the telephone demands immediate attention. Unlike the unsolicited bulk mail advertisement found in the mail collected at the resident's leisure, the ring of the telephone mandates prompt response, interrupting a meal, a restful soak in the bathtub, even intruding on the intimacy of the bedroom. Indeed, for the elderly or disabled, the note of urgency sounded by the ring of the telephone signals a journey which may subject the subscriber to the risk of injury. Unlike the radio or the television, whose delivery of speech, either commercial or noncommercial, depends on the listener's summons, the telephone summons the subscriber, depriving him or her of the ability to select the expression to which he or she will expose herself or himself.

State by Humphrey v. Casino Mktg. Grp., Inc., 491 N.W.2d 882, 888–89 (Minn. 1992). And "to whatever extent the government's significant interest lies exclusively in residential privacy, the nature of cell phones renders the restriction of unsolicited [calls and] text messaging all the more necessary to ensure that privacy[.]" *Campbell-Ewald Co.*, 768 F.3d at 876–77 (suggesting that "most cellular users have their phones with them when they are at home[,]" and citing statistics that "over 40% of American households now rely exclusively on wireless telephone service").

Indeed, the government's interest in protecting the privacy of consumers is not only significant, but even "compelling," as required to survive strict scrutiny. *O'Toole v. O'Connor*, 802 F.3d 783, 789 (6th Cir. 2015) (explaining requirements for strict scrutiny). The TCPA was enacted for the express purpose of limiting telephonic intrusions into American homes, *see Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012), and the Supreme Court has recognized that "the privacy of the home [is] where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder[.]" *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (citing *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970)); *Rowan*, 397 U.S. at 737–38 ("The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality . . . We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another."); *Hill*, 530 U.S. at 716–17 ("The unwilling listener's interest in avoiding unwanted communication . . . is an aspect of the broader 'right to be let alone' . . . characterized as the most comprehensive of rights and the right most valued by civilized men . . . . The right to avoid unwelcome speech has special force in the privacy of the home[.]") (citations and quotations omitted). Thus, the TCPA serves a compelling government interest — protecting the privacy of consumers in their homes and, with respect to cell phones, their persons.[9]

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[9] *See Riley v. California*, 134 S. Ct. 2473, 2494–95 (2014) ("Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life[.]") (quotations and citation omitted).

The TCPA is also "narrowly tailored." *See Abbas v. Selling Source, LLC*, No. 09-3413, 2009 WL 4884471, at *8 (N.D. Ill. Dec. 14, 2009) (finding TCPA "narrowly tailored to advance government's substantial interest in protecting the privacy of consumers, particularly from the nuisance of automated calls"). The statute permits *any* call with consent, and otherwise only disallows calls using the specific technology found to harm consumers. Further, it provides ample alternative channels of communication — whether by simply obtaining consent before proceeding with automated calling, or by using non-automated, live methods of communication. *Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831, 842 (Ariz. Ct. App. 2005); *Strickler*, 2012 WL 5386089, at *6.

Finally, the TCPA presents the least restrictive means of serving the government's interest in preventing automated calls from invading the privacy of consumers. This fact is evident from the specific findings of Congress in enacting the TCPA:

> (10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.
>
> (11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.
>
> (12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the *only effective means* of protecting telephone consumers from this nuisance and privacy invasion.

Pub. L. No. 102-243, § 2 (1991) (emphasis added).

Despite substantial evidence that consumers consider all robocalls a nuisance and an invasion of privacy, and that they are largely unable to avoid such calls, Congress chose *not* to enact an outright ban on all autodialed or prerecorded voice technology. Rather, companies like

ADT are free to make calls using such technology as often as they wish, to any consumer they wish, on any subject they wish, and for any purpose, so long as they obtain the call recipient's consent. Where the targeted conduct is otherwise permitted in its entirety, and Congress specifically found that the *only* means of effectively protecting this privacy interest was to ban the use of unsolicited automated and prerecorded voice technology altogether, there can be no lesser alternative restriction.[10]

Therefore, because the TCPA withstands intermediate scrutiny — whether as a content-neutral time, place and manner restriction or due to the TCPA's commercial purpose of restricting automated telemarketing — and regardless, would withstand the rigors of strict scrutiny, the TCPA does not violate the Constitution.

III. Conclusion

ADT should not be allowed to outsource its TCPA liability to unnamed Philippine call centers, and its constitutional argument is without merit. The motion for summary judgment should be denied.

Respectfully submitted,

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[10] This least restrictive means has itself been unsuccessful at stemming the proliferation of automated calling. *See In re Rules & Regs. Implementing the TCPA*, No. 02-278, 2015 WL 4387780, ¶ 1 (July 10, 2015) ("Month after month, unwanted robocalls and texts, both telemarketing and informational, top the list of consumer complaints received by the [FCC].").

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will automatically provide notice to the following attorney(s) of record by electronic means:

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